Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area	WC Docket No. 04-223

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

Qwest Corporation ("Qwest") has presented a very strong case that it is entitled to forbearance from the requirements of section 251(c) and of portions of section 271(c)(2)(B) in the Omaha Metropolitan Statistical Area ("MSA"). It has shown not only that barriers to entry into the local telecommunications market have been eliminated but also that competitive providers have actually entered and captured a substantial share of the market. Although some competitors quibble about the extent of Qwest's current market share in the Omaha MSA, it is undisputed that facilities-based competitors (including cable operators) are competing head-to-head with Qwest for the large majority of customers within the MSA. Under these circumstances, continuing to enforce the requirements of section 251(c) and the overlapping requirements of the competitive checklist is not necessary either to protect consumers or to ensure that Qwest's rates and practices are just and reasonable and not unreasonably discriminatory. Moreover, forbearance under these circumstances is clearly consistent with the public interest.

A number of commenters have taken issue with Qwest's evidentiary showing regarding the state of competition in Omaha, and Qwest is in the best position to respond to those comments. But these commenters have also challenged the legal sufficiency of Qwest's petition by grossly mischaracterizing the requirements necessary to justify forbearance. SBC Communications Inc. ("SBC") will take this opportunity briefly to address three issues: First, section 10(d) presents no bar to the Commission's consideration of Qwest's petition, because the requirements of sections 251(c) and 271 "have been fully implemented" in Nebraska. Second, granting Qwest's petition would not constitute a limitation or extension of the "terms used in the competitive checklist" in contravention of section 271(d)(4). And, third, the relevant question on the merits is whether Qwest continues to exercise market power in the provision of local telecommunications services to end-user customers in the Omaha MSA, not whether there exist alternative providers of *wholesale* telecommunications services at cost-based rates.

II. ARGUMENT

A. The Commission Has the Legal Authority To Forbear from Enforcing Sections 251(c) and 271(c)(2)(B) Now That Those Requirements Have Been "Fully Implemented" in Nebraska

The granting of a section 271 application means that the competitive-checklist requirements of section 271 have been "fully implemented," 47 U.S.C. § 271(d)(3)(A)(i); therefore, once the Commission has granted a section 271 application for a particular state, the prohibition contained in section 10(d) against this Commission's forbearing from enforcing any requirement of section 271 no longer applies. The Commission granted Qwest's section 271 application for Nebraska on December 23, 2002, concluding that Qwest had "fully implemented the competitive checklist." *Id.*[1] Of course, merely because the Commission may now entertain a

[1] *See* Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of*

petition for forbearance in Nebraska does *not* mean that this Commission must forbear from enforcing the requirements of section 251(c) and the competitive checklist; granting section 271 relief means only that the requirements of section 251(c) and the competitive checklist have been fully implemented and that section 10(d) no longer presents a bar to this Commission's forbearing from the requirements. Whether an applicant in fact satisfies the conditions for forbearance under section 10(a) is a separate question.

Some commenters in this proceeding argue that the term "fully implemented" in section 271(d)(3)(A) does not mean the same thing as "fully implemented" in section 10(d). *See* AT&T at 27-28; Cox at 9-10; MCI at 17-20; Sprint at 11-13. They are, of course, operating against a well-established presumption "that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999); *see also U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057, 1060 (D.C. Cir. 1999) ("we normally attribute consistent meanings to statutory terms").

Although there are exceptions to this general rule, none of them applies here. In *Atlantic Cleaners & Dyers*, the Supreme Court articulated the case for rebutting the "natural presumption" that identical words used in the same statute have identical meanings:

> Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.

Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, 17 FCC Rcd 26303 (2002).

286 U.S. at 433.[2]

Obviously, Congress exercised the same legislative authority in using the words "fully implemented" in section 271(d)(3)(A) that it exercised when using the identical words in section 10(d). Moreover, the subject matter to which the words refer *is* the same in both places – section 10(d) refers to fully implementing the "requirements" of sections 251(c) and 271, while section 271(d)(3)(A) refers to fully implementing "the competitive checklist" – *i.e.*, the list that contains the substantive requirements of section 271 and the relevant incumbent LEC obligations contained in section 251(c).

Moreover, there is nothing remotely unreasonable about interpreting the phrase "fully implemented" in section 10(d) in the same way that it is interpreted in section 271(d)(3)(A) – namely, once a section 271 application has been granted, then (and only then) is the Commission authorized to forbear from the requirements of the competitive checklist (and the corresponding requirements of section 251(c)). *All* of the requirements under the competitive checklist were "fully implemented" in Nebraska on the day the Commission granted Qwest's section 271 application; otherwise, the Commission could not have granted it. Therefore, as of the date on which the application was granted, the Commission was no longer prohibited from forbearing from any of those requirements. Congress clearly wanted to be sure that the Commission did not forbear from applying any of the requirements of section 271 before the Bell company had

[2] In *Atlantic Cleaners & Dyers*, the Court concluded that the word "trade," when used in section 1 of the Sherman Act, was limited to the authority that Congress had under Article I, Section 8, Clause 3 "[t]o regulate Commerce with foreign Nations, and among the several States," whereas the scope of that same word as used in section 3 of the Sherman Act, which governed trade in the District of Columbia, was not similarly limited. Because the Court concluded that Congress intended to "deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to exercise all the power it possessed," 286 U.S. at 435, it considered itself free to interpret the word "trade" more broadly in section 3 than in section 1.

satisfied those requirements through the section 271 application process. But now that Qwest has demonstrated that the competitive checklist had been "fully implemented" in Nebraska, section 10(d) is no longer an obstacle to the Commission's consideration of the conditions for forbearance under section 10(a).

Some commenters argue that section 10(d) should be read to mean that all of the requirements of sections 251(c) and 271 must be fully implemented before the Commission may forbear from enforcing any particular requirement, *see* AT&T at 26; MCI at 18. Yet, they are putting words into the statute, reading section 10(d) as if it limited the Commission's authority to forbear from any requirements of sections 251(c) and 271 until "*all of the* requirements" of sections 251(c) and 271 have been fully implemented. That is not how the statute reads. As section 10(a) makes clear, the Commission has authority to "forbear from applying any regulation *or any provision* of this chapter," 47 U.S.C. § 160(a) (emphasis added), and section 10(d) simply provides that any requirements of sections 251(c) and 271 must be "fully implemented" before the Commission has the authority to entertain a petition to forbear from enforcing such a requirement. The Commission found each of the specific provisions of sections 251(c) and 271 for which Qwest has sought forbearance – in particular, sections 251(c)(2)-(6) and 271(c)(2)(B)(i)-(vi), (xiv) – to have been "fully implemented" when it granted Qwest's section 271 application in Nebraska.

AT&T and others suggest that the *OI&M Forbearance Order*[3] precludes this understanding of the "fully implemented" language. They are wrong. The Commission concluded in the *OI&M Forbearance Order* that a single "requirement" of section 271 – namely,

[3] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, 18 FCC Rcd 23525 (2003) ("*OI&M Forbearance Order*"), *appeal pending, Verizon Tel. Cos. v. FCC*, No. 03-1404 (D.C. Cir.).

the requirement under section 271(d)(3)(B) that the section 271 authority "be carried out in accordance with the requirements of section 272" – had not yet been "fully implemented" as of the date the section 271 application was granted. The Commission held that, notwithstanding its having granted the section 271 application, it could not forbear from applying the obligations under section 272 because those specific requirements would not be "fully implemented" until the third anniversary of the section 271 order.[4] The Commission recognized, however, that its analysis "applies only to whether section 271 is 'fully implemented' with respect to the cross-referenced requirements of section 272, and does not address whether *any other part of section 271, such as the section 271(c) competitive checklist*, is 'fully implemented.'"[5] Although the Commission did not decide whether "any other part of section 271" had been "fully implemented," it did recognize that it is appropriate under section 10 to analyze the requirements of section 271 separately.

Qwest is not requesting that the Commission forbear from the requirements of section 272 in Nebraska. Until those requirements sunset in December 2005, the Commission's *OI&M Forbearance Order* makes clear that the Commission is precluded under section 10(d) from granting any such application. But every other requirement of section 271 – including, most relevantly, the competitive checklist and the incorporated requirements of section 251(c) – *has* now been fully implemented, and the Commission is free to consider whether Qwest's petition satisfies the forbearance criteria of section 10(a).

[4] *See id.* ¶ 6.

[5] *Id.* (emphasis added).

B. Section 271(d)(4) Is No Obstacle to This Commission's Exercise of Its Forbearance Authority

Some commenters have argued that, because section 271(d)(4) provides that the Commission may not, "by rule or otherwise, limit or extend the terms used in the competitive checklist," 47 U.S.C. § 271(d)(4), the Commission is somehow forbidden from ever forbearing from the requirements of the competitive checklist. *See* AT&T at 23-25; Sprint at 3-6. They are wrong for several reasons.

First, section 271(d)(4) is a limitation on the Commission's authority within a specific statutory context – namely, the provisions governing Bell operating company *entry* into the market for interLATA services. The Commission has understood the limitation imposed by section 271(d)(4) to mean that, when "mak[ing] a separate determination that approval of a section 271 application is 'consistent with the public interest, convenience, and necessity,' [the Commission] may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B)."[6] Congress's point was a simple one – when deciding whether an applicant has "fully implemented the competitive checklist in subsection (c)(2)(B)," 47 U.S.C. § 271(d)(3)(A)(i), the Commission should apply the terms of the competitive checklist as Congress set them down.

Second, the commenters' reading of section 271(d)(4) makes no sense when analyzed together with section 10(d). If they were correct that section 271(d)(4) prohibits the Commission from ever forbearing from applying the obligations of the competitive checklist, then what could Congress have possibly intended by forbidding the Commission to forbear "from applying the requirements of section . . . 271 . . . *until* it determines that those requirements have been fully

[6] Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, ¶ 280 (2002).

implemented," 47 U.S.C. § 160(d) (emphasis added)? Even AT&T argues that the requirements of section 10(d) would be satisfied if "there is ubiquitous availability of durable, cost-based, wholesale alternatives to incumbent carriers' bottleneck facilities," AT&T at 29; yet, AT&T's reading of section 271(d)(4) means that, even after such a condition were satisfied, the Commission would nonetheless be foreclosed from relieving the Bell company of the obligations under the competitive checklist. Nothing requires this Commission to give credence to so absurd a reading of the statute.

Third, AT&T argues that Qwest's forbearance petition is inconsistent with the plain terms of the statute, which prohibit the limitation of the checklist "by rule *or otherwise*." *See id.* at 24 (emphasis added). As mentioned above, section 271(d)(4) clearly was intended to limit the ability of the Commission – either by rule, by forbearance, by neglect, "or otherwise" – to alter the specific requirements that Bell companies had to satisfy before they could be authorized to provide in-region, interLATA services. The Bell companies had argued throughout the section 271 process that the Commission could not use its broad authority to ensure that the "requested authorization" was consistent with the public interest to add additional local-competition requirements beyond those that Congress articulated in the checklist. Had section 271(d)(4) only prohibited the Commission from limiting or extending the terms of the checklist "by rule," it might have been argued that the Commission was free to limit or extend the terms through other means – *e.g.*, during the course of a section 271 application. The "or otherwise" clause made it certain that the Commission could not alter the Bell companies' obligation to implement fully the terms of the competitive checklist before being granted long-distance authority. That reading is not only coherent – it is the only reading that makes sense in light of the purposes of section 271.

Finally, some commenters argue that forbearance under these circumstances would be contrary to the Commission's repeated pledges in the section 271 context to use section 271(d)(6) to monitor the Bell companies' ongoing compliance with section 271. *See* AT&T at 24-25; Sprint at 5-6; MCI at 19 n.40. But forbearance has nothing to do with the Bell companies' continuing obligations to comply with the remaining requirements of section 271. If the Commission forbears from enforcing section 271(c)(2)(B)(i)-(vi) and (xiv) in the Omaha MSA because it has concluded that forbearance is in the public interest and that enforcement of these particular checklist requirements is not necessary to protect consumers or to ensure just, reasonable, and nondiscriminatory rates, then Qwest would be relieved of any continuing obligation to comply with these checklist requirements. In every other respect, however, Qwest would be obligated under section 271(d)(6) to remain in compliance with the requirements of section 271. This Commission would retain its full authority to enforce all of the remaining obligations of section 271 (including those aspects of the competitive checklist that would be unaffected by the granting of Qwest's petition) under section 271(d)(6).

C. Forbearance Depends on the Presence of Competitive Alternatives to the Incumbent Carrier in the Retail Market for Telecommunications Services, Not on the Presence of Alternative Providers of Wholesale Services at Cost-Based Rates

In order to open the retail telecommunications market to competition, Congress imposed unprecedented obligations on incumbent local exchange carriers to unbundle certain essential network elements at cost-based rates, to make their retail telecommunications services available to other carriers at a wholesale discount, and to interconnect their networks with the facilities of other carriers. But once these requirements have served their purpose – that is, once facilities-based, retail competition has taken hold in a definable geographic market – their continued enforcement will cause serious harm by distorting the market through asymmetrical regulatory

burdens, discouraging investment, and depriving consumers of the innovation and efficiency that are the hallmarks of a truly free, competitive marketplace. Under such circumstances, forbearance is necessary to ensure that the continued application of these requirements does not deny consumers the very benefits that sections 251(c) and 271 were intended to secure.

A number of commenters nevertheless make the extraordinary argument that, before Qwest could ever be entitled to forbearance from the requirements of section 251(c) and the relevant provisions of section 271(c)(2)(B), Qwest would have to demonstrate that there exist alternative providers of wholesale telecommunications services at cost-based rates. *See*, *e.g.*, AT&T at 11-12; Cox at 14; Sprint at 7-9. This argument reflects a willful misreading of this Commission's prior decisions, relevant precedent, and the text and purposes of the 1996 Act.

First, in the context of evaluating whether competitors would be "impaired" without access to the incumbent's network, this Commission has already rejected the argument that the appropriate question is whether there exists a competitive wholesale market for the requested service.

> [B]asing the 'impair' standard on the existence of a wholesale market does not take into consideration self-provisioning as a viable substitute to the incumbent LECs' network elements. . . . We find that, in order to thoroughly evaluate the availability of alternative elements outside of the incumbent LEC's network, we must consider elements available from all sources, including those elements available from third-party suppliers and through self-provisioning.[7]

This conclusion followed naturally from the Supreme Court's decision in *Iowa Utilities Board*, in which the Court had expressly faulted the Commission's analysis in the *Local Competition*

[7] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 56 (1999), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

Order for having "blind[ed] itself to the availability of elements outside the incumbent's network."[8]

The D.C. Circuit has similarly required the Commission to consider the presence of intermodal competition when evaluating the extent to which incumbents are required to make their networks available to competitors. *See USTA I*, 290 F.3d at 428 (vacating *Line Sharing Order* because the Commission "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)"). And, as the Commission recognized in the *Triennial Review Order*, the question is whether there is evidence that "new entrants are providing retail services in the relevant market using non-incumbent LEC facilities," as well as evidence that "intermodal alternatives can be used to provide telecommunications service."[9] This is precisely the sort of evidence that Qwest has provided in its petition and that this Commission should evaluate when determining whether forbearance is appropriate. So, for example, when the Commission determined that it would not require the unbundling of broadband facilities, it did not ask whether there were alternative *wholesale* providers of broadband facilities at cost-based rates. Rather, it recognized that the existence of intermodal competition at the retail level ensured that there would be vigorous competition from other sources, "even if CLECs proved unable to compete with ILECs in the broadband market." *USTA II*, 359 F.3d at 580 (citing *Triennial Review Order* ¶ 292).

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[8] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999).

[9] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 7, 97 (2003) ("*Triennial Review Order*") (footnote omitted), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending, NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004).

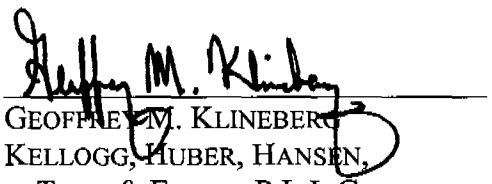
Finally, the fact that the Commission should concentrate on the state of competition in the retail telephone exchange service market is confirmed by section 251(h)(2), governing the conditions under which a comparable local exchange carrier may be treated as an incumbent local exchange carrier for purposes of section 251. Congress made clear that the relevant question is whether "such carrier occupies a position in the market *for telephone exchange service* within an area that is comparable to the position occupied by" the incumbent LEC, 47 U.S.C. § 251(h)(2)(A), not whether such a carrier is providing wholesale services at cost-based rates. The essential characteristic of an incumbent LEC, therefore, is that it provides *retail* telecommunications services to subscribers. Qwest's petition is essentially the reverse of section 251(h)(2) – Qwest is arguing that it no longer "occupies a position in the market for telephone exchange service within [the Omaha MSA] that is comparable to the position" it had formerly occupied. Qwest has demonstrated that it faces tremendous competition in the retail market for telecommunications services in the Omaha MSA, and that is the relevant market for evaluating whether it is appropriate to forbear from enforcing the requirements of section 251(c) and the relevant provisions of section 271(c)(2)(B).

III. CONCLUSION

For the reasons discussed above, this Commission should conclude that the requirements of section 251(c) and of the competitive checklist of section 271(c)(2)(B) have been fully implemented within the meaning of section 10(d); that granting Qwest's forbearance petition would not constitute an impermissible limitation of the terms used in the competitive checklist within the meaning of section 271(d)(4); and that it is the extent of competition in the provision of local retail telecommunications services that is the relevant market for evaluating whether forbearance from the requirements of sections 251(c) and 271 is in the public interest and

whether enforcement of these particular requirements is unnecessary to protect consumers or to ensure just, reasonable, and nondiscriminatory rates.

Respectfully submitted,



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